No. 42341-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

D.D.,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Linda C.J. Lee, Judge

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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The trial court abused its discretion in revoking the Special Sex Offender Sentencing Alternative (SSOSA) sentence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the trial court abuse its discretion in revoking the SSOSA sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant D.D.[1] was charged by information filed in Pierce County with one count of first-degree rape of a child, alleged to have been committed when he was 16 years old. CP 1-3; RCW 9A.44.073.

On February 5, 2009, the Honorable Judge Linda C.J. Lee accepted D.D.'s guilty plea. CP 5-16; 1RP 1-10.[2] On March 6, 2009, Judge Lee imposed a Special Sex Offender Sentencing Alternative (SSOSA) sentence of 123 months, with 12 months in custody less 169 days of credit for time

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[1]Due to the defendant's age at the time of the offense and the nature of the crime, he will be referred to herein by initials. See RAP 3.4; In re Dependency of R.W., 143 Wn. App. 219, 221 n. 1, 177 P.3d 186 (2008).

[2]The verbatim report of proceedings consists of multiple days which are, unfortunately, contained in two bound volumes but not chronologically paginated. The first volume contains the proceedings of February 5 and March 6, 2009, April 2, August 21 and September 17, 2010, and February 3, March 18, April 15 and June 3, 2011. Those proceedings will be referred to as follows:

February 5, 2009, as "1RP;"
March 6, 2009, as "2RP;"
April 2, 2010, as "3RP;"
August 21, 2010, as "4RP;"
September 17, 2010, as "5RP;"
February 3, 2011, as "6RP;"
March 18, 2011, as "7RP;"
April 15, 2011, as "8RP;"
June 3, 2011, as "9RP."

The second volume contains the proceedings of June 22, 2011, which will be referred to as "10RP."

served and 111 months suspended. 2RP 15-16; CP 22-38.

D.D. appealed and this pleading follows. See CP 110.

2. Facts relating to offense

In entering his plea to first-degree rape of a child, D.D. admitted to having sexual contact with his cousin, K.S., once when she was 11 and he was 16. CP 5-16.

3. Facts relating to issues on appeal

As part of the plea, the prosecutor agreed to recommend a SSOSA sentence. 2RP 3. At the hearing on the SSOSA, counsel noted that D.D. had no prior criminal history and that the incident was a "singular event," as confirmed by the victim, for which D.D. had taken full responsibility by entering a plea. 2RP 3-5. The incident had occurred when D.D. was 16 years old and D.D. was only 17 at sentencing. 2RP 7-10. Counsel pointed out that the treatment evaluator, Mr. Comte, had found D.D. to be very young in "his verbal and actual intellectual presentation," more like 13 than his actual age. 2RP 11.

Counsel also noted that, unfortunately, D.D. was himself a victim of sexual abuse and had grown up in a very chaotic situation, with both parents involved in substance abuse and criminal activity. 2RP 2-10.

D.D. told the court he was very sorry for what he did, knew it was wrong and would "do right" if the court gave him "a second chance." 2RP 12-13.

The court noted that D.D. was determined by presentence investigation to be a low risk for reoffending and was not likely to "do this again and again and again, based on all the professionals. 2RP 15. The

court said it had "gone back and forth like a seesaw" but that it thought that the best thing to do for everyone was to impose a SSOSA. 2RP 15. The court told D.D. it would be "very frank" with him, that the court did not "believe in giving second chances on SSOSAs" and that the judge wanted Dransfied to "stick to the SSOSA conditions one hundred percent." 2RP 16.

At a review hearing on April 2, 2010, the prosecutor noted that D.D. was in compliance with all of the conditions imposed on him. 3RP 3. The court told D.D. to "[k]eep up the good work" and that he was "doing a good job." 3RP 3. The court said that it had reviewed the court file and D.D. had "never given an indication that he's going to be doing anything other than following what he is required to do[.]" 3RP 4.

On August 27, 2010, the prosecutor appeared before the judge without counsel present. 4RP 2. He noted that counsel for D.D. had moved to withdraw a few weeks earlier, so new counsel needed to be appointed. 4RP 2-3. That same day, the prosecutor had filed a "Petition for Hearing to Determine Noncompliance with Condition or Requirement of Sentence," which alleged three charges: failing to report since May 27, 2010, failing to reregister as a sex offender after June 11, 2010, and failing to successfully complete a sexual deviancy treatment program. CP 76-78. The court agreed that counsel should be present to assist with the proceedings. 4RP 3.

New counsel was present on September 17, 2010, when the parties appeared before the court for a hearing on the Petition. 5RP 2. At the hearing, the prosecutor said that D.D. had failed to report to the

Department of Corrections since May 27 of that year, had moved out of the residence with his father on June 11th, had not gone to treatment since about June 17th and had "absconded from supervision." 5RP 3. The prosecutor argued for imposition of the suspended sentence. 5RP 4.

The Department of Corrections (DOC) officer who had been working with D.D., Greg Montague, testified that DOC was not asking for a revocation of the suspended sentence but instead was recommending only 240 days in jail as a sanction. 5RP 4. The prosecution nevertheless refused to change its recommendation despite DOC's position. 5RP 5.

Counsel told the court that D.D. was stipulating to all of the violations. 5RP 4-6. He explained that D.D. had been living with his father, they got in a fight and D.D. left, after which D.D. was out in the community for about three months. 5RP 6. Counsel pointed out that D.D.'s decision was impulsive and that he was still a juvenile but that he could be held sufficiently accountable by imposing the DOC recommendation. 5RP 5-6. The prosecutor said the issue was not just an argument with his father but also meeting a "young lady." 5RP 13.

The court said it was usually "very unforgiving on violations, because you get the break when you get the SSOSA sentence," but that D.D. had been doing "so good prior to whatever happened." 5RP 11. The court said it was going to give him another chance and impose 270 days in custody as a sanction, rather than revoking the suspended sentence. 5RP 11-12. The court said it would need a detailed treatment plan and D.D. would need a permanent residence before he would be released and that court was going to keep D.D. "on a very tight leash" for the remainder of

the SSOSA. 5RP 12. It entered a written order reflecting its decision and declaring that D.D. had been "advised strict compliance with SSOSA expected, one more violation will result in revocation." CP 83.

On February 4, 2011, the parties again appeared before the court, this time for a review hearing. 6RP 2. Counsel told the court that the fact that the family was of "limited means" was causing problems with finding a treatment provider or housing but that TeamChild had been working on it as well and things were in the works. 6RP 1-8. The court said it appeared "all parties actually are working towards trying to get a good plan together for [D.D.] to get him the tools and resources he will need to be successful and to not have another setback." 6RP 7-8. The judge again warned D.D. that she would not tolerate any further issues, regardless what they were, and that instead if there was another violation, "I am going to revoke the SSOSA." 6RP 8.

Further discussions about treatment and housing occurred on March 18, 2011. 7RP 1. The prosecution was objecting to the treatment provider being changed, despite having received an email from a new potential treatment provider. 7RP 2-3. The prosecutor asked for the court to keep D.D. in custody until there could be further information and a full treatment plan. 7RP 3-4. Counsel explained that there was some question about the funding because of D.D.'s previous time without supervision, "whether the State's going to pay for his treatment going forward." 7RP 5. The court expressed concern about how long the process was taking but said, "[i]t's not a surprise." 7RP 6. The court was frustrated that the was "a predicament he [D.D.] placed himself in with his own actions." 7RP 7.

The court entered an order that D.D. was to remain in custody until he satisfied the requirements of having living arrangements and a SSOSA treatment plan. CP 88.

On April 15, the prosecutor told the court that she had received polygraph testing results which showed "no deception" about what had happened during the time when D.D. had "absconded" and that the same treatment provider who had worked with him originally was willing to work with him again. 8RP 2. Given that, the prosecutor said, "we are asking to put an order into effect" releasing D.D. back into the SSOSA, with the provision that it be ensured that the housing facility was appropriate. 8RP 3.

Counsel told the court that D.D. had an ongoing relationship with his girlfriend who was not going to turn 18 until July. 8RP 5. Counsel said he had advised D.D. that he could not have contact with her under the court's order until she turned 18. 8RP 5. The prosecutor then declared "for treatment" that D.D. could not have any contact with or be in a relationship with a female "typically for at least a year until he's in treatment." 8RP 5. Counsel pointed out, however, that such a decision was up to the treatment provider and the court had not entered any such order. 8RP 5. Counsel also told the court there was an order saying "[n]o contact with minors, period," and that was clear. 8RP 6. Counsel said it was up to the treatment provider to figure out "the most appropriate treatment modality and when he should have contact with this girl and when he shouldn't" but the parties should not try to "micromanage his therapy." 8RP 7.

The court said it was important for D.D. to follow whatever his treatment provider said "because the next time you land back in this courtroom for a violation, I am inclined to revoke your SSOSA sentencing." 8RP 8. The court also told D.D. he was to have "no contact" with his girlfriend at least until she was 18 years old. 8RP 8. The court entered an "Order Continuing SSOSA Treatment," requiring D.D. to go into treatment and live in particular housing, and that he have no contact with his girlfriend until she was 18 and "approved by treatment provider." CP 93-94.

A Petition to revoke was filed by the prosecution on May 26, 2011, alleging that D.D. had consumed alcohol once. CP 95-98. On June 3, 2011, the parties appeared on that petition. 9RP 2. The prosecutor told the court that D.D. had been arrested for consuming alcohol. 9RP 2. Counsel told the court that he had just received the report and needed more time to talk to and consult with his client, as well as talking to others regarding the potential revocation. 9RP 3. The court said "I'm not sure what it is you are needing to prepare," and counsel responded that he needed to get full information about what had happened. 9RP 4. He noted this was "a serious matter, involves a lot of prison time for" D.D. if he was revoked and that D.D. had "a right to have a prepared lawyer" at such proceedings. 9RP 4. There was some discussion in which it was explained that D.D. had started treatment with his provider and that there were some issues regarding whether he had actually been terminated from that treatment, with a DOC officer declaring that the treatment provider had said that D.D. was not in compliance but the provider was not

terminating him from treatment. 9RP 6. The matter was continued. 9RP 9.

On June 22, 2011, the parties appeared for the revocation hearing. 10RP 3. The prosecution had a second petition alleging five violations, which were that, while D.D. was in jail, he was visited by the mother of his child, as well as their infant, and had several phone calls with her, as well as that he had not progressed in treatment in the month from April to May. 10RP 3. The girl was a month away from turning 18. 10RP 2-3. The Petition apparently was not filed in the court file.

Counsel told the court that D.D. was stipulating both that he had consumed alcohol and that he had contact with his girlfriend and daughter when they visited him in jail and had phone calls to there as well. 10RP 4. Counsel said that he had a document from Prayer Tower Ministries, which had agreed to provide D.D. with housing. 10RP 4-5. Counsel also noted that he was trying to find another treatment alternative and that Paul Alig, an attorney for TeamChild, had found a treatment provider who would "like the opportunity to at least meet with" D.D.," the housing provider and counsel to "render an opinion whether she would be willing to treat him further." 10RP 6.

Counsel said that he was "not asking for a continuance technically" but that he was asking the court to "reserve its ruling on revocation until the Court has a chance" to hear from the new potential treatment provider, Ms. Saylor. 10RP 6. Counsel told the court that he understood the court's concerns about the situation but still believed D.D. was "salvageable," given his age and situation. 10RP 6. In short, counsel said, the court was

obviously going to find "violations," because D.D. was stipulating to them, and the only real question was what the court was going to decide to do as a result. 10RP 6-7.

The prosecutor detailed the phone conversations between D.D. and his girlfriend, which lasted about 120 minutes in total and involved D.D. talking to and calming his infant daughter on the phone, discussing visits and similar things. 10RP 8. The prosecutor nevertheless said that these violations were serious because he was not supposed to "have contact with minors, period." 10RP 8. The prosecutor asked the court to reserve ruling on whether it would allow further time for the new treatment provider information. 10RP 9.

At that point, the original treatment provider, Dan Dewaelsche, testified that D.D. had started treatment in October of 2009 and continued until June of 2010, when he had left his father's home and Dewaelsche "terminate[d] him from treatment." 10RP 9-11. Dewaelsche said that, in general, with "anybody that comes in" as young as D.D., there was always a concern about "ability to follow structure and rules." 10RP 12. The provider noted that D.D. had been diagnosed with "behavior conduct disorder" which involves "impulsivity, not particularly listening to authority figures, just doing what he wanted to do." 10RP 13. Dewaelsche said that was the "experience" he had with D.D., although not at first but rather only after he moved back to Tacoma. 10RP 13.

Indeed, Dewaelsche admitted, D.D. clearly was, at least initially, "trying to adhere to the rules." 10RP 13.

Dewaelsche said that he thought that D.D. had started "pushing

rules" at his father's home and not coming home, and that he had been warned that if he did those things he was going to be back in court. 10RP 14.

Even after D.D. had left his father's home and been given the sanction for it, Dewaelsche still took him back into treatment. 10RP 15. A polygraph test was administered which showed there "weren't any new victims" during the time D.D. was out in the community. 10RP 15. D.D. went to several treatment sessions when he was accepted back. 10RP 15. and talked about wanting to get a job and trying to support his child, as well as being with the mother of the child. 10RP 15. The treatment provider said that would take a bit of time and that he wanted D.D. to focus on getting "back on track" first. 10RP 16. Dewaelsche also said that D.D. reported meeting a girl in church that he was interested in who was not a minor and to whom he had been honest about his conviction. 10RP 16. Dewaelsche testified that he told D.D. that the treatment provider did not want D.D. to get involved with anyone else. 10RP 16.

At another session, they talked about what D.D. had been doing, how his placement was going and other things and "everything appeared to be running a little bit smoother." 10RP 17. In the last session, D.D. admitted to having "given way to peer pressure" and gone out and had drinks with a friend of his. 10RP 17-18. The friend was supposedly aware that D.D. was not supposed to consume alcohol but nevertheless wanted to go out with him to do that, anyway. 10RP 18.

It was this self-reported incident that caused Dewaelsche to call the probation officer and say 'we really weren't making any headway here,"

because Dewaelsche did not know if anything was making "much of an impact" on D.D., based on the boy's self-admissions. 10RP 18.

When first asked if D.D. had made "any real progress" in the sex offense treatment, Dewaelsche said, "[n]o." 10RP 19. On cross-examination, however, the treatment provider conceded that, in fact, for about a five month period, D.D. appeared for every individual weekly session, never missing a single one. 10RP 21-22. In addition, D.D. was "doing well" in treatment overall, with just a few exceptions. 10RP 22. The treatment provider thought there was then some difficulty with transportation and with what was going on at the home with D.D.'s father, prior to D.D. leaving that home. 10RP 21-23. While there were some issues, there was nothing that caused Dewaelsche to call anyone or anything like that, and the treatment provider said he was still willing to continue to treat D.D. at that time. 10RP 23.

D.D. had not appeared after that because he was in custody, not because D.D. decided not to show up. 10RP 32.

Dewaelsche said that he had concerns that D.D. was not "making good decisions" and was "placing himself in environments where there are minors." 10RP 19. Dewaelsche also declared there was a "total disregard for rules" and that, although D.D. was able to articulate what he should not do, D.D. did not have the "capacity" to put those limits into action. 10RP 19-20.

Dewaelsche conceded that the psychosexual evaluation of D.D. showed he was "very immature and presents as much younger" than his actual age, more like a 12 or 13 year old. 10RP 24. Indeed, the treatment

provider said, D.D. "still presents that way," even a few years after that original diagnosis. 10RP 25. Dewaelsche was also aware that D.D. had been sexually abused as a four-year-old child himself, and that D.D. had a prior history of using marijuana and alcohol before he had gotten into treatment. 10RP 25. In addition, the treatment provider noted, D.D. was diagnosed with attention deficit and hyperactivity disorder, something Dewaelsche noted himself during their interactions. 10RP 25. There was also a possibility that D.D. suffered from not only a mood disorder but might also be bipolar. 10RP 29.

Dewaelsche agreed that D.D. was a "low risk of reoffense" if he followed the rules but said that there was more likelihood of reoffense when D.D. was not and when he placed himself in environments where he could have sexual contact with people who were technically under age. 10RP 26. The provider did not think that D.D. would have such contact with a prepubescent child, however, unless "he felt that person was pursuing him." 10RP 26.

The treatment provider admitted that, when D.D. was "on abscond status" for several months, D.D. apparently had no such incidents besides being with his new girlfriend, who was 16 when he was 18. 10RP 28. Dewaelsche said that while this was normally an age range for an "age-appropriate relationship," he would not have agreed to it from a treatment standpoint, even though it was legal and probably "appropriate" in terms of age. 10RP 28.

Dewaelsche knew of absolutely no evidence of any contact with any other "children" during the entire time D.D. had been serving the

SSOSA, aside from the girlfriend and essentially supervised contact with her and his own child in the jail. 10RP 28-29.

In his evaluations of D.D., Dewaelsche said, it was clear that D.D. was "borderline low/average intellect," was "impulsive," easily frustrated and had poor judgment - most of which were "typical characteristics of a teenager in general." 10RP 29.

The presentencing evaluation had stressed that D.D. should be in group sessions "not with adult offenders" but rather offenders his own age, but Dewaelsche did not facilitate that, he said, because that would put D.D. technically in violation of the "no contact with minors" order of the court. 10RP 30. Dewaelsche also said there were enough differences with the adult and juvenile systems that he did not think having people from both systems working in therapy together made sense. 10RP 30.

In sum, the treatment provider admitted, D.D. was a young man who had the maturity level of a 12 or 13 year old who was being treated as if he had the judgment of an adult. 10RP 32. Dewaelsche explained that, while he understood D.D.'s age and where he was "at mentally," D.D. was "going to have to understand" what the adult system required of him, something the provider thought D.D. had the capacity to potentially understand. 10RP 32.

Dewaelsche admitted, however, that people in the developmental age range that D.D. had did not always see "that consequence is a reality" for their actions. 10RP 32. And the treatment provider admitted that D.D. had voluntarily, "without prompting," told Dewaelsche about having broken the rules by going drinking with the girl. 10RP 34.

The provider admitted that, in the treatment process, D.D. had accepted "total responsibility for the offense," had shown appropriate empathy for the victim, was originally "[d]oing well" in addressing the issues, and had been participating, listening and appeared to be on track. 10RP 40. Dewaelsche thought it was when D.D. was moved from the home of his grandfather to his father's home that "things started to fall apart." 10RP 40. The provider did not think it was the father, per se, but rather that D.D. was in a different environment and associating with different people. 10RP 40. He said if D.D.'s environment had been "controlled closer," it was very likely that D.D. would have "been a lot more successful" in the SSOSA. 10RP 41.

Dewaelsche nevertheless opined that D.D. was no longer a "good candidate" for a SSOSA. 10RP 38.

When asked about whether D.D. would have a greater risk to reoffend if he was in the adult system for 7-8 years and had no incentive, essentially, to engage in treatment there, rather than continuing the SSOSA, Dewaelsche was prevented from answering by the prosecutor's objection, which the court sustained. 10RP 34-35.

After Dewaelsche's testimony, the prosecution argued that D.D. had "failed to have satisfactory progress in treatment" from April to May of that year. 10RP 43. Counsel told the court he had no witnesses but that D.D. wanted to talk to the court. 10RP 43. D.D. then apologized for his recent mistakes and asked for one more chance to prove himself, so that he could be there for his daughter, go back to society, get a better education and a job and complete the SSOSA. 10RP 43-44.

At that point, counsel again said he wanted to call Maureen Saylor, the potential treatment provider, as a witness. 10RP 43-44. He again asked the court to reserve ruling until it had heard from Ms. Saylor. 10RP 43-44. He said Saylor had indicated a willingness to treat D.D. and additional time was needed to facilitate that. 10RP 44. The prosecutor asked the court not to continue the matter but said the court should just revoke based upon the existing evidence. 10RP 45. The court noted there was information that Saylor had "been in the picture" since March, but recognized that the allegation of lack of progress in treatment had only just been brought. 10RP 46. The court said that whether Saylor was willing to treat D.D. did not address whether there was a problem with his current progress in treatment, to which counsel agreed. 10RP 46. Counsel reiterated, however, that he was asking the court not to impose a sanction that day, whether revocation or something else, until it could hear from Ms. Saylor, regardless whether there were violations or not. 10RP 46. He said that, if the court was going to order revocation and it did not matter if someone was willing to treat him, then that was one thing but otherwise he wanted to have the opportunity to present Saylor's testimony about possible treatment. 10RP 47.

The court then said that, based upon the stipulations, it would find that there was unauthorized contact with a minor in the jail and on the phone, as well as the consumption of alcohol. 10RP 47. The court also found that there was a "violation" for failure to make "satisfactory progress in treatment" during the month between his release and when he was arrested for the self-reported alcohol violation. 10RP 49. The court

then told counsel, "I don't think Ms. Saylor's testimony will affect this Court's ruling one way or the other in this proceeding." 19RP 51.

At that point, the judge declared, she specifically remembered telling D.D. she was going to give him one more chance with the previous violation and he "took that chance" and "threw it out the window." 10RP 51. She also said D.D. had written a letter saying the same things he was saying that day , back when the initial revocation hearing was held. 10RP 52. She said it appeared "nothing has changed" from that day and he could say the right thing, but his "conduct seems not to be able to comply with the words." 10RP 52. The court then declared it was revoking the SSOSA. 10RP 52.

Counsel then said he had intended to provide argument on the issue but had thought the judge was going to make a ruling on his motion to continue first. 10RP 52. The judge said she was willing to hear the argument, and counsel responded that he wanted to "put it on the record just so it's clear." 10RP 52. He told the court that Dewaelsche himself recognized that D.D. offended when he was 16, for the very first offense, and that even at age 19 D.D. still the mind and maturity level of a 12 or 13 year old. 10RP 52. Counsel noted that D.D. was "caught up in an adult system with adult rules and adult expectations," and that, regardless whether that seemed fair, it was the law. 10RP 52. Counsel said that, in his experience with D.D., he had found D.D. to be "impusive," and to have poor judgment:

> And yet, for eight months, [he] went weekly to Mr. Dewaelsche's office, said the right things, had insight, spoke of empathy for the victim, talked about precursors and ways to prevent this from

> happening again. At the same time, fighting environmental challenges, including peers and family and a lot of other issues out there.

10RP 52-53.

Counsel said it was "almost expected," given D.D.'s age and maturity, that he would "violate some of the rules along the way. 10RP 53. But counsel was not arguing that there should not be "a consequence," such as the sanction the court gave when D.D. had left his father's home and gone to "galavant around," ending up with a child as a result. 10RP 53.

Counsel pointed out that Dewaelsche had said that D.D. was a low risk to reoffend in any way similar to the offense he was charged with, i.e., with an 11-year-old girl, but instead that D.D. was interested in "peer-aged females." 10RP 53. Counsel saw D.D. as "a very immature[,] impulsive person who did some things that a lot of teenagers do" - which did not make it all "right," counsel said, and did not mean there should not be consequences, but should not end up sending D.D. to prison where he would not necessarily get treatment and would be released without supervision for life, because of his age when he committed the offense. 10RP 54. Counsel said there was no guarantee that D.D. would get any assistance or treatment in prison and that he was going to be released back into the community whether he did treatment or not. 10RP 54.

Counsel then reminded the court that the actual violations in the case were that D.D. "went out one night and drank alcohol with a peer-aged female," and had contact with his girlfriend, who is one month shy of 18 and who is the mother of his child, as well as his child, while he was in

jail. 10RP 55-56. He told the court "these are behaviors that are typical of a teenager, and he is a teenager" whose mental capacity "is that of barely a teenager." 10RP 56.

Counsel said he would not disagree at all with the court ordering D.D. to spend another six months in jail but implored the court to recognize that, while D.D. was doing things "he shouldn't be doing," he was not committing crimes like the one with which he was chargedn. 10RP 56. Counsel said D.D. had a lot of support and housing and that counsel was "hopeful we have a treatment provider," which he did not think would "be an issue." 10RP 57. Ultimately, counsel implored the court to "look at the big picture" and treat D.D. like the juvenile he really was when he committed the crime and still really was "in mind." 10RP 57.

The prosecutor argued that the big picture meant also for the "victim, for society and what treatment offers," words the court had used in initially imposing the SSOSA. 10RP 58. She again reminded the court that D.D. had absconded for two months and had smoked pot and had alcohol during that time, as well as getting his 17-year old girlfriend pregnant. 10RP 59. The prosecutor said D.D. knew the consequences and "just violates left and right." 10RP 63.

The court said that, while defense counsel was "very passionate" in his arguments, "it does not change this Court's position." 10RP 63. The court told D.D. it had been "very clear" with him that it would not "tolerate another violation." 10RP 63. The judge said, "I meant it. I am revoking you." 10RP 63. The judge said there was no guarantee D.D.

would get treatment in prison but there was also no guarantee that he would take advantage of the opportunity for treatment if the SSOSA was continued. 10RP 63. The judge concluded, "[y]ou have shown me time and time again through multiple violations that you're not willing to do what you need to do to deserve a SSOSA sentence." 10RP 63. The judge said "all I needed was one and I was going to revoke him." 10RP 64.

The court then backtracked on its decision, saying it felt that it "may have confused the record" by referring to the things D.D. had done when he had "absconded." 10RP 65. The court said that it was finding there was unsatisfactory progress in treatment from April 18 to May 21, as well as D.D.'s self-reporting of having given way to peer pressure to go drinking with a peer female. 10RP 65. The court also said it was finding that D.D. knew drinking was in clear violation of treatment and his conditions "in Appendix H." 10RP 65.

D. ARGUMENT

THE COURT ABUSED ITS DISCRETION IN REVOKING THE SPECIAL SEX OFFENDER SENTENCING ALTERNATIVE (SSOSA) SENTENCE

A SSOSA sentence is an alternative which a court may impose on an eligible sex offender in which the court imposes a brief term of confinement, followed by community custody in which the offender engages in treatment. See RCW 9.94A.670(4) and (5). If an offender violates the conditions of a suspended sentence or fails to make satisfactory progress in treatment, the court may order the offender to be confined for a period of time or may decide to revoke the suspended sentence. See RCW 9.94B.040; see also, State v. Partee, 141 Wn. App.

355, 360-61, 170 P.3d 30 (2007).

The decision to revoke a SSOSA is generally reviewed for abuse of discretion. See State v. Dahl, 139 Wn.2d 678, 990 P.3d 396 (1999). A court abuses its discretion if its decision is manifestly unreasonable or on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In addition, defendants who face a SSOSA revocation have minimal due process rights which must be honored when a court is considering revocation. Dahl, 139 Wn.2d at 686. Those rights include 1) the right to written notice of the alleged violations, 2) the right to disclosure of the evidence against him, 3) the opportunity to be heard on the allegations, 4) a limited right to confront and cross-examine witnesses, 5) the right to have the decision made by a neutral and detached hearing body and 6) a statement from the court as to the evidence it relied on and reason it was entering a revocation. Id.

In this case, D.D. submits that the lower court abused its discretion in revoking the SSOSA. There is no question that D.D. committed violations - he stipulated to them. But this is not a case in which the defendant lied about the allegations, or tried to hide them. Compare, State v. Miller, 159 Wn. App. 911, 920, 247 P.3d 457, review denied, 172 Wn.2d 1010 (2011). Instead, in this case D.D. *reported himself* at least one of the violations - the drinking.

Further, D.D. had a potential treatment provider and placement to help ensure that he would regain his previous success with the SSOSA sentence.

Nor was revocation necessary in light of the purposes of SSOSA, which are "to prevent future crimes and protect society." State v. Young, 125 Wn.2d 688, 693, 888 P.2d 142 (1995).

Further, the state's own experts admitted that D.D. was developmentally only about 12 or 13 years old. The U.S. Supreme Court itself has recognized that juveniles are not only more susceptible to but also more vulnerable to outside influences not as a character fault but as a developmental ability. See Roper v. Simmons, 543 U.S. 551, 569, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005). Juveniles are also recognized to have a lack of maturity, an underdeveloped sense of responsibility, and a likelihood to recklessness, simply based upon development at their age. Id, see, Johnson v. Texas, 509 U.S. 350, 113 S. Ct. 2638, 125 L. Ed. 2d 290 (1993).

Considering D.D.'s developmental age and the purposes of the SSOSA sentence, his lapses were not necessarily the product of deliberate unwillingness to follow rules, as one would see in an adult. Instead, those acts were more likely the product of his age and immaturity. Yet D.D. had also made very significant efforts to comply with the court's requirements. On balance, given all the evidence in this case, the trial court should have given him one final chance. It is D.D.'s position that the trial court abused its discretion in revoking the suspended sentence in this case, and this Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 21st day of February, 2012.

Respectfully submitted,

/s/ Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY EFILING AND MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel at the Pierce County Prosecutor's office via portal upload this date and to D.D., DOC 327567, Monroe CC, P.O. Box 777, Monroe, WA. 98272.

DATED this 21st day of February, 2012.

/s/Kathryn Russell Selk
KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

RUSSELL SELK LAW OFFICES

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